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No. 89-1784

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA and
KERWICK & CURRAN, INC.,

Petitioners,

v.

BEN COOPER, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The petitioners, The Insurance Company of the State of Pennsylvania ("ICSP") and Kerwick & Curran, Inc., submit this brief in reply to the briefs of the respondent, Ben Cooper, Inc. and the intervenor, the United States.

SUMMARY OF ARGUMENT

The Court of Appeals for the Second Circuit had jurisdiction over the appeal below. The district court order appealed from satisfies the finality requirements of 28 U.S.C. §1291; alternatively, jurisdiction was proper under 28 U.S.C. §1292(a)(1). The intervenor's arguments concerning appealability are merely a procedural gambit, rife with gaps in logic, designed for no greater purpose than to channel the Court's thinking in the intervenor's direction. In essence, the intervenor argues that if this is a core

matter, the court of appeals had proper jurisdiction and, conversely, if this is a non-core matter, it did not. This argument fails for several reasons, not the least of which is that it ignores the very substance and nature of the district court's order.

The respondent and the intervenor argue that the post-petition timing of the contract *ipso facto* converts the private state law contract dispute into a public right. The teachings of *Marathon* and *Granfinanciera* refute this contention. Congress cannot properly delegate full adjudicatory power over the instant garden-variety contract dispute to an article I forum, and it should not be presumed that Congress attempted to do so. Neither does a private litigant consent to bankruptcy court jurisdiction by the act of entering into an insurance contract with a debtor in possession.

A constitutional right cannot be waived unknowingly. Respondent's and intervenor's arguments that the petitioners have waived their seventh amendment right by implication from the act of contracting with respondent ignores settled constitutional mandate. Furthermore, petitioners have not consented to the bankruptcy court's jurisdiction; they have never filed a proof of claim against respondent's estate. To the contrary, petitioners have objected to the jurisdiction of the bankruptcy court and timely demanded a jury trial at the inception of this dispute.

Moreover, whether parties expressly consent to jurisdiction or waive the right to trial by jury in an article III forum is irrelevant if the Constitution prohibits Congress from delegating such adjudicatory power to an article I forum. Since Congress has not empowered bankruptcy judges by statute to conduct jury trials, it is not necessary for the Court to reach the question whether such a delegation of power comports with article III and the seventh amendment. Even if Congress had attempted to do so, delegation of essential attributes of the judicial power to bankruptcy judges would impermissibly erode article III.

ARGUMENT

I. THE SECOND CIRCUIT HAD JURISDICTION OF THE APPEAL BELOW

A. *The Intervenor's Argument Is Premised On A Mischaracterization Of The District Court Decision.*

The intervenor's jurisdiction argument gets caught up in itself and creates issues which do not exist. The reason that neither the court of appeals nor the parties addressed the question of jurisdiction is that no such question is present. In essence, the Solicitor General is attempting to compel the Court to rule in favor of the intervenor on the merits of the core/non-core issue, or not at all. While the approach undoubtedly promotes an agenda of avoiding confrontation of the thorny questions engendered by this appeal, the legal components of the arguments advanced do not hold together.[1]

The Solicitor General's analysis breaks down at the very start when he seeks to dismember the district court's decision, stating that "[t]he district court entered three orders: it withdrew the reference of the case to the bankruptcy court, it abstained in favor of the state court action, and it dissolved the bankruptcy court's injunction staying that state court litigation [and] Respondent appealed only the first of those orders—the district court's withdrawal of the reference to the bankruptcy court." U.S. Br. 10.[2] This characterization of the district court's oral ruling misconstrues the record and ignores the substance of the appeal.

As discussed below, the district court's order clearly satisfies finality standards for appeal. The Solicitor General concedes that the abstention element of the decision rendered the withdrawal of the reference reviewable. U.S. Br. 12-13.[3] Then, apparently

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[1] If the Court nevertheless agrees with the intervenor's position in Point I of his brief, the appropriate remedy is to vacate the decision below and remand the case with instructions to reinstate the order of the district court. *See Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976).

[2] References to "U.S. Br." followed by a page number indicate reference to the intervenor's brief.

[3] Clearly, the withdrawal of the reference and dissolution of the bankruptcy court injunction became final under 28 U.S.C. § 1291 by virtue of the court's abstention. *See* Point I. B, *infra*.

ignoring his earlier view that the appeal related to "only the first" order, the withdrawal of the reference, the Solicitor General limits his focus to the abstention, analyzing it in isolation as "a final decision." U.S. Br. 13-16.[4]

The district court's order must be viewed as a whole. The order, once recognized as a single final decision, satisfies even the Solicitor General's criteria for appealability. The nature and basis of the district court's abstention ruling, with which the Solicitor General is obsessed, are irrelevant. Respondent's appeal was not from the district court's decision to abstain, but, rather, the oral decision and order as a whole.[5]

Recognizing that his jurisdiction argument would also fail if one were to analyze the appealability of the dissolution of the bankruptcy court's injunction, the Solicitor General flatly states that no appeal was taken with respect to that aspect of the district court's ruling. U.S. Br. 10. This assertion is incorrect. While respondent specifically stated in its brief below that it was not appealing the abstention ruling, it made no such representation as to any other aspect of the order and, it is submitted, there is no basis for inferring a further limitation. Cooper's Ct. App. Br. 6 n.*.[6,7]

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[4] At one point, the Solicitor General proposes that in the course of the district court's oral decision, Judge Stanton made a number of "interlocutory rulings" culminating in the abstention. Actually, in terms of sequence of events, the last element of the ruling was the dissolution of the bankruptcy court's injunction, something which the district court was theoretically without power to do, having already abstained. Such a nonsensical analysis is, of course, the product of taking a single order and decision, engaging in the fiction of breaking it up into parts, and giving special meaning to the sequence in which the court addresses the various issues before it.

[5] Respondent's notice of appeal cannot reasonably be construed to limit the scope of the appeal to only a segment of the district court's order. To do so would be illogical, inconsistent with what ultimately was the substance of the appeal, and contrary to established principles. *Foman v. Davis*, 371 U.S. 178, 181 (1962); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988). In any event, since the district court's order was final, any segment of the order which was reviewable, was appealable. *See* Point I. B, *infra*.

[6] References to "Cooper's Ct. App. Br." followed by a page number indicate reference to the respondent's brief to the Court of Appeals for the Second Circuit.

[7] In an effort to bolster his argument, the Solicitor General implies that an order which would be appealable at the time it is entered, might subsequently become

(*Footnote continued*)

In support of the claim that the injunction was not part of the appeal, the intervenor's brief cites the opinion of the court of appeals which states that the respondent did not raise that issue. U.S. Br. 10, citing A-7.[8] The comment is taken out of context. The Second Circuit had noted the parties' agreement that the primary issues involved were "(1) whether the adversary proceeding is core, and (2) whether appellees are entitled to a jury trial, . . ." A-6-7. The district court's conclusion that this dispute involved a non-core matter in which petitioners were entitled to a jury trial was integrally related to its conclusion that the reference must be withdrawn and, therefore, required that the district court dissolve the bankruptcy court's injunction, which is precisely what Judge Stanton did. That the injunction was not separately addressed in the court of appeals did not extinguish the appealability of the order.

The respondent's appeal sought a reversal of the district court's decision, and a return of the matter to the bankruptcy court, obviously not so that identical litigations would then proceed on parallel tracks in the state court and the bankruptcy court. The respondent's appeal below, therefore, necessarily encompassed all aspects of the district court's order, save only the abstention ruling which respondent understood to be unreviewable. It is undeniable that both the dissolution of the injunction and the district court's withdrawal of the reference are inextricably intertwined with the viability of the bankruptcy court's jurisdiction.

B. *The District Court Order Was Appealable As A Final Order Under 28 U.S.C. § 1291.*

The Solicitor General recognizes that 28 U.S.C. § 1291 is applicable to the appealability issue before the Court. U.S. Br. 13.

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not appealable because of the appellant's arguments in the appellate court. "Respondent's tack in the court of appeals raises a serious jurisdictional issue." U.S. Br. 10. Not only is there no support in the record for the substance of the argument, but the theoretical framework is fallacious. Whether or not an order or ruling is appealable is determined on the basis of the record below and the order itself.

[8] The Solicitor General is wrong when he states that "[r]espondent explicitly said it was not appealing from" the decision to lift the stay. U.S. Br. 10. In support

(*Footnote continued*)

As discussed above, the district court entered a single order. Although the respondent did not seek to argue that the abstention was improper – an issue it considered unreviewable – the fact that the district court did abstain cemented appellate jurisdiction because the abstention rendered the order final. *See* 28 U.S.C. §1291; *See Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 9 (1983)(if order contemplates that suit will not return to federal court it is final, for purposes of appeal).

The instant case is distinguishable from several superficially similar matters in which the courts have considered the appealability of a withdrawal of reference (a fact that the Solicitor General does not dispute). There is little question that if the district court had withdrawn the reference of this matter but had not abstained, a different analysis would apply.[9] In this case, however, the district court's order viewed in its entirety presents appellate jurisdiction under § 1291.

In *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), the Court discussed the circumstances under which a collateral order will be immediately appealable under § 1291: to wit, if it 1) conclusively determines a disputed question; 2) resolves an important issue separate from the merits; and 3) would be effectively unreviewable on appeal from a final judgment. *Cohen* and its progeny provide for an appeal in the circumstances which are present in this case. The district court's determination that the dispute between petitioners and respondent was not core; was not properly before the bankruptcy court; should be tried by a jury; and should be heard in the state court, satisfies the *Cohen* requirements, including that element which is often found wanting, *i.e.*, that the order would be effectively unreviewable on

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of this statement, the Solicitor General cites to the court of appeals decision below, not the respondent. In fact, respondent only said it was not appealing the abstention. Cooper's Ct. App. Br. 6, n*.

[9] Ordinarily, as the Solicitor General points out, the decision of the district court to withdraw the reference from the bankruptcy court is not appealable as such. U.S. Br. 10-11. *See, e.g., In re Chateauguy Corp.*, 826 F.2d 1177, 1179-80 (2d Cir. 1987); However, all of these decisions involve matters where jurisdiction of the withdrawn matter was retained by the district court. The analysis of the withdrawal would change if it involved surrendering jurisdiction to a state court. *Cf. Elscint, Inc. v. First Wisconsin Fin. Corp. (In re Xonics, Inc.)*, 813 F.2d 127, 129-130 (7th Cir. 1987).

appeal from a final judgment.[10] The district court, by abstaining, made the withdrawal of the reference, the lifting of the stay, and the right to a trial by jury all properly reviewable by immediate appeal. *See also Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

The Solicitor General's abstention argument, U.S. Br. 13-17, is a red herring. The reviewability, *vel non*, of the abstention is irrelevant. Judge Stanton's decision to abstain[11] made the other parts of the order, which were otherwise reviewable, appealable because the abstention rendered the order final in federal court.

C. *The District Court's Lifting Of The Injunction Was Appealable Under 28 U.S.C. § 1292(a)(1).*

There is no dispute as to the appealability under 28 U.S.C. § 1292(a)(1) of the district court's lifting of the injunction. U.S. Br. 11, n.4. *See Nat'l Labor Relations Bd. v. Goodman (In re Goodman)*, 873 F.2d 598, 601-02 (2d Cir. 1989) (order refusing to dissolve injunction is appealable under 28 U.S.C. § 1292(a)(1)).[12] The Solicitor General points out that the "stay order" was "inextricably bound up" with the court's decisions to abstain and to withdraw the reference. U.S. Br. 11 n.4.

Title 28 U.S.C. § 1292(a)(1) provides a basis for immediate appeal of "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving

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[10] The district court's rulings as to the core/non-core issue, the right to a jury trial, and the proper forum for the litigation are final because these issues will not be before the state court.

[11] The intervenor also misrepresents the distinction between permissive and mandatory abstention. U.S. Br. 16. Mandatory abstention relates only to non-core matters. 28 U.S.C. § 1334 (c)(2). Permissive abstention, however, relates to both core and non-core matters. §1334 (c)(1) applies to proceedings "arising under title 11 or arising in *or related to* a case under title 11." (emphasis added).

[12] The intervenor's view that the stay was under 28 U.S.C. §362(a) and (d)(1) is in error. The injunction was granted on motion, J.A. 12, and concerned matters outside the purview of the automatic stay under § 362 which, as the name implies, springs to life without the necessity of a motion.

injunctions, . . ." One need not go outside the literal terms of the statute to find an independent ground for appellate jurisdiction. Judge Stanton's ruling specifically addressed and lifted the "preliminary injunction" issued by the bankruptcy court, which had enjoined the continued prosecution of the state court action pending the hearing and determination of the adversary proceeding. A-26-28.

The Solicitor General argues that, notwithstanding § 1292(a)(1), the district court's dissolution of the injunction was not appealable since such appeal would entail review of the abstention (allegedly prohibited under § 1334(c)(2)). U.S. Br. 11 n.4. This reasoning is supported neither by logic nor legal authority. Moreover, while the viability of the bankruptcy court's jurisdsiction and the injunction it issued were intertwined, the abstention was a completely separate matter which had no impact on either jurisdiction or the injunction.

II. *MARATHON* AND *GRANFINANCIERA* REQUIRE A NON-CORE DESIGNATION OF THE UNDERLYING CONTRACT DISPUTE

The respondent and the intervenor insist that a claim under a post-petition contract concerns a public right. The BAJFA, however, manifests no intent to transform breach of contract actions from common-law disputes into public-right disputes appropriate for non-article III adjudication. The modern article III jurisprudence of this Court articulated in *Marathon* and *Granfinanciera* belies the contention of the respondent and the intervenor that a public right designation for common-law contract actions would be constitutional.

> . . . [T]he [*Marathon*] plurality also emphasized that state-law causes of action for breach of contract or warranty are paradigmatic private rights, even when asserted by an insolvent corporation in the midst of Chapter 11 reorganization proceedings. The plurality

> further said that "matters from their nature subject to 'a suit at common law or in equity or admiralty'" lie at the "protected core" of Article III judicial power.

Granfinanciera, S.A. v. Nordberg, ____ U.S. ____, ____ 109 S. Ct. 2782, 2797-98 (1989).

A right to recover under an insurance contract is not a congressionally created right, like the statutory right at issue in *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568 (1985), but is rather a state common-law right whose adjudication involves no federal rule. The Constitution sets limits to the power of Congress to delegate adjudication, even of statutory rights, to a non-article III forum.

> If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.

Granfinanciera, 109 S. Ct. at 2797. Where no bankruptcy principle governs the resolution of the dispute, the dispute cannot be said to be closely intertwined with a federal regulatory program.

Granfinanciera made clear that even where Congress has labeled an action or claim as a core matter, purporting to constitute it a public right, constitutional requirements override congressional intent. The underlying contract dispute does not even fall within any statutory provision purporting to constitute it a public right and a core bankruptcy matter.

Claims by the debtor against a non-creditor appear nowhere in 28 U.S.C. §157(b)(2). It cannot credibly be argued that Congress expressly constituted contract actions involving post-petition contracts as core matters by creating a core designation for "matters concerning the administration of the estate." Subsection 157(b)(2)(A) by its terms embraces no categories of "actions" or "claims," but rather *administrative matters*, such as hiring or firing or compensation of a trustee. The wording of § 157(b)(2)(A) does not suggest that it applies to anything outside the substantive law of bankruptcy.

The general language of §157(b)(2)(A) cannot be interpreted to bring the underlying contract action within the rule of *Atlas Roofing Co., Inc. v. OSHRC*, 430 U.S. 442 (1977) and *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568 (1985). It is equally clear that the rule of *Atlas Roofing* and *Thomas* cannot be invoked by references to legislative history (in fact, merely comments by one representative) suggesting an intent to provide for broad bankruptcy jurisdiction. The creation of a public right replacing a private right and the relegation of disputes concerning the new right to a non-article III forum cannot be demonstrated by such casual and informal "evidence."

Atlas Roofing and *Thomas* involved rights that but for an act of Congress would not exist.[13] The statutes in question specifically provided that disputes arising out of those statutorily created rights would be resolved by non-article III decisionmakers.

This Court held that the *Marathon* rule was not controlling in *Thomas* because the right to compensation at issue in *Thomas* arose under FIFRA and did not depend on or replace a right created and controlled by state law. *Thomas*, 473 U.S. at 583. For the same reasons that *Marathon* was not controlling in *Thomas*, *Thomas* is not controlling here. The BAFJA does not operate to bring the underlying insurance dispute before a non-article III decisionmaker.

The intervenor and the respondent, relying on *Arnold Print Works, Inc. v. Apkin*, 815 F.2d 165 (1st Cir. 1987), hark back, in their examination of the core/non-core issue, to tradition developed under the Bankruptcy Act of 1898 (the "1898 Act").[14]

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[13] In *Atlas Roofing*, the petitioner contested a congressionally enacted statute under the Occupational Safety and Health Act which provided that the imposition of civil penalties against an employer for maintaining unsafe working conditions could be challenged before an administrative law judge of the Occupational Safety and Health Review Commission whose findings of fact would be deemed final. In *Thomas*, the petitioners, pesticide manufacturers, challenged a congressionally created statute under the 1978 Amendments to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), which provided for a binding arbitration of disputes arising out of the data use and compensation scheme.

[14] In a recent case addressing the core/non-core dichotomy, the Third Circuit observed, "[t]he *Arnold* [*Print Works*] court distinguished *Marathon* by noting

(*Footnote continued*)

An analysis buttressed by the jurisdictional scheme of that long-repealed Act is anachronistic and untenable in the light of *Marathon* and *Granfinanciera*. Those are landmark, watershed cases construing article III parameters in the bankruptcy context. The structure of jurisdiction of the 1898 Act was never challenged in this Court on article III grounds and, accordingly, never sanctioned by this Court.[15]

The analysis propounded in *Arnold Print Works* and in the opinion of the court of appeals below contravenes the recent article III jurisprudence of this court. The limited holding of *Marathon* (set forth in Justice Rehnquist's concurrence) applies to traditional common law contract actions arising under state law. That characterization indisputably embraces the insurance dispute at issue here.[16]

The intervenor contends that the underlying dispute "falls within the literal wording of § 157 (b)(2)(A)." U.S. Br. 19. As noted, *supra*, all that subsection says is "matters concerning the administration of the estate." The intervenor further asserts:

> The efforts of a trustee or debtor-in-possession to protect and preserve the *res* of the estate by insuring its assets fit squarely within long-accepted notions of "administration of the estate" [citation omitted].

U.S. Br. 20. The petitioners do not dispute that the fulfillment or non-fulfillment by a trustee or debtor of duties under a plan might properly be characterized as matters concerning the administration of the estate. That category would not, however, encompass a state-law breach-of-contract action against a non-creditor. The intervenor's argument conflates two entirely different sorts of proceedings. Under *Marathon* and *Granfinanciera*, a common law

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that in *Marathon* the contract claim arose pre-petition, while in *Arnold* the contract claim was based on a post-petition contract. While we agree with the *Arnold* court that in fact *Marathon* was based on pre-petition conduct, there is no indication that either the plurality or the concurrence relied on this distinction." *Beard v. Braunstein*, 914 F.2d 435 (3d Cir. 1990).

[15] *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 79 n.31 (1982).

[16] The *Granfinanciera* court refrained from characterizing even the "restructuring of debtor-creditor relations" as a public right. 109 S. Ct. at 2797 n.11.

contract action is not appropriate for non-article III adjudication and cannot be made so simply by characterizing it as a matter of administration.

The phrase "long accepted" in the intervenor's argument is signal and telling. The cornerstone concepts of the arguments of respondent and intervenor are the supposed transformational effect of the filing of the bankruptcy petition; and the alleged far-reaching effect of "contracting with an officer of the bankruptcy court." That historically such factors were viewed under a bygone statutory scheme as supporting summary adjudication—which no longer exists—is not even pertinent in the wake of this Court's recent article III and private rights jurisprudence.

The intervenor relies heavily on the significance of the creation of the bankruptcy estate and the concomitant duty of the debtor to protect the *res*. U.S. Br. 33-34. The same *res* existed pre-petition in the form of the debtor's assets. The invocation of bankruptcy protection works no change in the assets insured, or in the rights and duties of insureds or insurers under policies of insurance. In suits on pre-petition contracts, just as in suits on post-petition contracts, the dispute arises or at least continues after the creation of the bankruptcy estate: otherwise, there would be no question of bankruptcy jurisdiction presented. Recovery on a post-petition contract has no more or less effect on "estate administration" than recovery on a pre-petition contract.[11] No viable explanation has been offered as to why the *Marathon* private rights doctrine does not apply to an action on a post-petition contract.

The respondent states that the contract action is a matter of administration. However, it is not: it is a contract action. The respondent says the contract action concerns the bankruptcy estate because the bankruptcy estate has been formed when the contract is formed. Respondent does not explain, however, how issues of contractual liability and damages become bankruptcy issues; and how or why the adjudication of contract issues should differ, depending on the timing of the contract.

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[11] It should be noted that neither the respondent nor the intervenor set forth any basis for subjecting petitioner Kerwick & Curran, Inc. to the bankruptcy court's core jurisdiction. The arguments advanced focus entirely on ICSP's contract of insurance which, it is contended, constitutes consent to core jurisdiction.

Marathon and *Granfinanciera* constitute the modern parameters of bankruptcy jurisdiction. The present case does not "comfortably qualify" as a matter "at the heart of the administration of the bankruptcy estate." U.S. Br. 24. The "core" of bankruptcy jurisdiction is a concept developed in *Marathon* and *Granfinanciera*. Those cases nowhere intimate that a suit for contract damages against a non-creditor falls anywhere near the core, which those cases state to be "the restructuring of debtor-creditor relations." *Marathon*, 458 U.S. at 71; *Granfinanciera*, 109 S. Ct. at 2797.

III. PETITIONERS ARE ENTITLED TO A JURY TRIAL FOR WHICH THE BANKRUPTCY COURT CANNOT BE THE PROPER FORUM

A. *Petitioners Have Neither Consented To The Bankruptcy Court's Jurisdiction Nor Waived Their Seventh Amendment Rights.*

The respondent and the intervenor argue that by the act of contracting with a debtor in possession, the petitioners have consented to the bankruptcy court's jurisdiction and thereby waived their right to a jury trial. Resp. Br. 30 n.31[8] and U.S. Br. 27-28. This proposition ignores basic constitutional mandates.

It is nonsense in the post-*Marathon* era to insist that by the act of contracting with the debtor, petitioners consented to core bankruptcy jurisdiction. The lesson of *Marathon* was that litigants' common law and constitutional rights are to be preserved. The petitioners could certainly not have expected to be governed by rules derived from traditional practice under a repealed nineteenth-century statute.[9] Likewise, the terming of the debtor in possession "an officer of the court," an inapt label in this context, and the denomination of the debtor's assets as "the bankruptcy estate" do not supply a reason for relegating common-law contract issues—identical in or out of bankruptcy—to a non-article III forum.

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[8] References to "Resp. Br." followed by a page number indicate reference to the respondent's brief.

[9] It should additionally be noted that respondent and intervenor do not adduce any decision of this Court to buttress the claim that the effect of a post-petition contract was to invoke summary adjudication by the referee.

The intervenor's reliance on *Katchen v. Landy*, 382 U.S. 323 (1966) as the basis upon which to argue that petitioners have submitted "to the equitable power of the bankruptcy court," U.S. Br. 28, is misplaced. In *Katchen*, the Court held that a creditor, by filing a claim against the estate in a bankruptcy proceeding, had subjected himself to the bankruptcy court's summary jurisdiction for the adjudication of the trustee's counterclaim. The Court noted that if the creditor had not filed his claim in the bankruptcy proceeding, the trustee would have been forced to bring "a plenary action . . . in the federal courts [where] the creditor could have demanded a jury trial." *Id.* at 327-28. The creditor's actions in *Katchen* and the petitioners' actions are not comparable. Unlike the creditor in *Katchen*, the petitioners have not submitted claims and are not creditors of the estate.

The intervenor's contention that the petitioners have consented to the equitable jurisdiction of the bankruptcy court (by the act of contracting with the respondent) is further rebutted by the views expressed by this Court in *Commodities Future Trading Comm'n v. Schor*, 478 U.S. 833 (1986) and *Granfinanciera*. In *Schor*, although the litigants had "indisputably waived" their right to trial in an article III court by *electing* to proceed before an administrative agency, the Court cautioned that "notions of consent and waiver cannot be dispositive because the [article III] limitations serve institutional interests that the parties cannot be expected to protect." *Schor*, 478 U.S. at 851. In other words, whether parties consent to the jurisdiction of an article I tribunal is irrelevant if article III prevents Congress from delegating the adjudicatory power in the first place. The intervenor's consent argument is premised entirely upon the fallacious assumption that Congress can delegate adjudicatory powers, thereby converting state-law claims into "public rights" under the purview of its article I bankruptcy power. *See* discussion, *supra*, at 8-9.

The intervenor's argument that the petitioners have waived their seventh amendment rights is as unconvincing and contrary to constitutional principles as its consent argument. The seventh amendment right to a trial by jury cannot be waived unknowingly or by implication as the intervenor contends. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464

(1938)(waiver of sixth amendment right to counsel). Since the "right of a jury trial is fundamental, courts indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)(discussing waiver of jury right in civil trial). Courts "do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937)(discussing denial of due process in regulatory setting). It is preposterous to assert that the seventh amendment right, a constitutional right, can be waived by the act of contracting with a debtor in possession.

B. *Since Congress Has Not Authorized Bankruptcy Judges To Conduct Jury Trials, Constitutional Issues Need Not Be Addressed.*

The intervenor concedes that there is no statutory empowerment under the BAFJA, either express or implied, for bankruptcy judges to conduct jury trials. This is consistent with the petitioners' position as supported by recent decisions in the Eighth and Tenth Circuits. *See In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990), and *In re Kaiser Steel Corp.*, 911 F.2d 380 (10th Cir. 1990). In addition to the arguments advanced in petitioners' brief, Point V. B, petitioners adopt the arguments advanced by the intervenor that Congress did not intend for bankruptcy judges to conduct jury trials.[20]

Respondent, however, advances the argument that 28 U.S.C. § 1411 and Bankruptcy Rule 9015 can be used to infer a statutory basis for jury trials in bankruptcy court. These arguments do not

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[20] Of note is the intervenor's third argument, U.S. Br. 38, concerning the lack of congressional intent. The intervenor contends that because Congress's purpose in the BAFJA was "to create a bankruptcy court scheme which would avoid the constitutional pitfalls exposed by *Marathon*," Congress could not have intended to vest that "essential attribute of judicial power," the power to preside over a jury trial, in the bankruptcy court. U.S. Br. 38. The logical conclusion to be drawn from this proposition is that if Congress *had* attempted to vest that "essential attribute of the judicial power" in the bankruptcy court under the BAFJA, the dictates of the Court in *Marathon* and the Constitution would have been violated. The intervenor's position here is logically inconsistent with its later argument supporting the constitutionality of non-article III judges' conducting jury trials. U.S. Br. Pt. III. C.

comport with accepted practices of statutory construction. *See* Pet. Br. 37-39[2] and U.S. Br. 35-36.

Petitioners' statutory analysis, which finds neither express nor implied authority for the conduct of jury trials by bankruptcy judges (as conceded by the intervenor), should end the Court's inquiry. There is no reason to consider the article III and seventh amendment questions addressed in the respondent's and the intervenor's briefs. As the Court recently stated in *Gomez v. United States* ___ U.S. ___, 109 S. Ct. 2237, 2241 (1989), "[i]t is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative or interpretation poses no constitutional question." In *Gomez* this Court found that:

> [b]ecause we decide that the Federal Magistrates Act does not allow the delegation of jury selection to magistrates, we need not consider the second question presented in this case; *i.e.*, whether such a delegation would be constitutional.

Id. at 2246 n.25 (Federal Magistrates Act ("FMA") did not contemplate conduct of voir dire by magistrates). Likewise in the case at bar, the Court need not consider whether if Congress had expressly authorized the conduct of jury trials in bankruptcy courts such delegation of article III power to a non-article III tribunal would comport with the Constitution. Indeed, to reach these constitutional issues would be to render a mere advisory opinion. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937).

C. If Congress Had Attempted To Grant Bankruptcy Judges The Jury Trial Power, Such An Empowerment Would Violate Article III And The Seventh Amendment.

The intervenor advances the argument that the 1898 Act should serve as a point of comparison in analyzing the BAFJA because those two schemes are jurisdictionally similar, and both are unlike

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[2] References to "Pet. Br." followed by a page number indicate references to petitioners' brief dated August 20, 1990.

the 1978 Act. It is true that under the 1898 Act and the BAFJA, the bankruptcy "courts" are adjuncts to the district courts; under both statutes, the district courts theoretically retain ultimate control. The repealed 1898 Act, however, simply cannot be relied upon to advance the constitutionality of the post-*Marathon* BAFJA. *See* discussion, *supra*, at 10-11 (this Court has never passed on the constitutionality of the 1898 Act). It cannot, therefore, be assumed that the 1898 Act's jurisdictional scheme is a valid, constitutionally sound model upon which the intervenor's arguments may rest.[22]

The intervenor posits that if bankruptcy judges can conduct bench trials consistent with article III, then the presence of a jury works to minimize concerns regarding the independence of article I judges. U.S. Br. 40. This argument ignores several important features of the roles of not only juries, but also trial judges.

First, the standard of review of a jury's findings of fact is significantly different from the appellate review of a judge's findings of fact. While a jury's findings cannot be re-examined, a judge's findings of fact are not subject to the seventh amendment prohibition against re-examination. Therefore, the intervenor's assertion – that the lack of threat posed to article III when bankruptcy judges conduct bench trials *ipso facto* means that the presence of a jury poses even less of a threat – embodies a faulty syllogism. The petitioners have a precious constitutional right, the right to trial by a jury of their peers. The seventh amendment is not implicated when bench trials are conducted.

Second, it is not a simple matter of the jury's serving as a check on the judge; the judge also serves as a check on the jury.

> [A]s the jury assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law, and also very much in investigating and

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[22] The intervenor also premises its arguments on an artificial distinction between article III and the seventh amendment. U.S. Br. Pt. II. C. This premise is flawed because the seventh amendment was intended as an amendment to article III. *Capital Traction Co. v. Hof*, 174 U.S. 1, 6-7 (1899). These sections cannot be viewed as two distinct items when analyzing whether non-article III judges may be empowered to conduct jury trials.

> enlightening the matter of fact, whereof the jury are judges. [Trial by jury] has the advantage of the judge's observation, attention and assistance, in point of law by way of decision, and in point of fact by way of direction to the jury.

Capital Traction Co. v. Hof, 174 U.S. at 14 (quoting Lord Hale, 2 Hale Hist. Com. Law (5th Ed.) 147, 156).

Judges rule "on evidentiary questions, on motions for mistrials and new trials, and on other matters requiring an assessment of the particular jury's ability and attentiveness; on these questions we defer broadly to the trial judge's judgment, in part because of his superior opportunity to evaluate the jurors." *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1369 (7th Cir. 1990) (held magistrates cannot conduct voir dire in civil jury trials in part because voir dire is a "vital stage of every jury trial"). The interaction between judge and jury is essential to the right guaranteed by the seventh amendment. *Gomez v. United States*, 109 S. Ct. at 2247. The power "to grant a new trial on the ground that the verdict was against the weight of the evidence" or to grant a judgment notwithstanding the verdict are within the unique province of an article III trial judge. 11 & 9, C. Wright & A. Miller, *Federal Practice and Procedure* §§ 2806, 2521 (1973). *See* Fed. R. Civ. P. 59(a), 50(b). Allowing bankruptcy judges to preside over jury trials impermissibly cedes these essential attributes of judicial power to an article I court.

The intervenor also argues that if magistrates can conduct jury trials consonant with article III, so may bankruptcy judges. While several circuits have upheld the constitutionality of federal magistrates' authority to conduct jury trials, circuit courts have done so primarily because express consent of the parties is required by statute.[23],[24]

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[23] It must be noted that this Court has never passed on the constitutionality of magistrates' authority to conduct jury trials even with the requisite consent as a "safeguard" to private litigants' rights as well as to article III.

[24] 28 U.S.C. §§ 636(c)(1)-(3) provide safeguards to assure the voluntariness of litigants' consent to adjudication by a magistrate in the district court. "[N]either the district judge nor the magistrate shall attempt to persuade or induce any

(*Footnote continued*)

Some circuit courts have found that the consent provisions of the FMA sufficiently safeguard its constitutionality because "[t]he right of access to Article III judges . . . may be viewed . . . as personal to the litigants and therefore subject to waiver." *See, Geras v. Lafayette Display Fixtures Inc.*, 742 F.2d 1037, 1041 (7th Cir. 1984). Obviously, the petitioners have not expressly consented to a bankruptcy court jury trial nor are there any statutory safeguards in the BAFJA similar to those in the FMA.

The intervenor and respondent advance policy arguments based on statistics reflecting the number of bankruptcy filings and pending proceedings. Resp. Br. 33 and U.S. Br. 44. The statistics cited, however, do not represent the number of jury trials and/or state law claims presented to the bankruptcy courts annually.[25] Moreover, in weighing the competing values at stake, it is not only patently unfair, it is also most inappropriate that the petitioners' right to adjudication in an article III or state court forum should give way to the large number of Chapter 11 filings. The constitutional rights of private litigants cannot be vitiated in the search for the cure for the 1980s leverage hangover. Neither should the long-standing concern for the protection of article III and the judiciary as first expressed by the Framers be discarded based on a perceived need to accommodate the use of the bankruptcy courts for speedy adjudication.

Petitioners do not advocate an "hermetic sealing off of the three branches of Government," *Buckley v. Valeo*, 424 U.S. 1, 121 (1976); there is necessarily some interplay among the branches. To delegate full adjudicatory power over private, common law actions to a non-article III tribunal, however, would impermissibly erode article III. *Granfinanciera*, 109 S. Ct. at 2796 (citing *Crowell v. Benson*, 285 U.S. 22, 51 (1932)). In *Crowell v. Benson*, the Court weighed the "utility and convenience" of delegating

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party to consent to reference of any civil matter to a magistrate." 28 U.S.C. § 636(c)(2). *See, Adams v. Heckler*, 794 F.2d 303, 307 (7th Cir. 1986)("valid consent is the linchpin of constitutionality of 28 U.S.C. § 636(c)").

[25] There do not appear to be any statistics currently available on the number of jury trials demanded or conducted in the bankruptcy courts. One could reasonably assume, however, that the number of jury trials demanded is significantly smaller than the total number of petitions filed.

fact finding functions to administrative agencies against the limitations which article III imposes. The Court concluded that for Congress to vest

> the authority to make [determinations of fact] with finality in its own instrumentalities or in the executive department . . . would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

Id. at 56-57. As the Court enunciated in *Granfinanciera*, even in a congressionally enumerated core matter—a matter closer to the core of the adjustment of the debtor-creditor relationship than the contract dispute involved here—the personal right to trial by jury could not be obviated by Congress in its exercise of article I powers.

CONCLUSION

For the foregoing reasons, the petitioners respectfully pray that the judgment of the court below be reversed with respect to its holding that this is a core proceeding and that a jury trial be conducted in the bankruptcy court and the ruling of the district court be reinstated.

Respectfully submitted,

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October 29, 1990

APPENDIX

APPENDIX

28 U.S.C. § 636. Jurisdiction, powers, and temporary assignment

* * *

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of district court. In this circumstance, the consent of the parties allows a magistrate

designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

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